(1) 95-1335

Supreme Court, U.S.
FILED
FEB 14 1996
CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1995

PETER PAUL HANSEN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

F. THOMAS HECHT*
MICHAEL A. FICARO
REBECCA D. WARD
HOPKINS & SUTTER
Three First National Plaza
Suite 3800
Chicago, Illinois 60602
(312) 558-6600

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred when it considered conduct that was "part of the instant offense," e.g., alcohol-related offenses, to be prior sentences under United States Sentencing Guidelines § 4A1.2(a)(1).

TABLE OF CONTENTS

Page

Opinions Below ..... 1

Jurisdiction ..... 1

Statutes Involved ..... 1

Statement of Case ..... 2

Reasons for Granting the Petition ..... 6

Conclusion ..... 14

Appendix

*United States v. Peter Paul Hansen,* United States Court of Appeals for the Sixth Circuit opinion .. App. 1

*United States v. Peter Paul Hansen,* United States District Court for the Western District of Michigan Judgment in a Criminal Case ..... App. 10

# TABLE OF AUTHORITIES

Page

## Cases

*Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995) ..... 13

*United States v. Banashefski*, 928 F.2d 349 (10th Cir. 1991) ..... 12

*United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992) ..... 7, 9, 11, 12

*United States v. Belton*, 890 F.2d 9 (7th Cir. 1989) .... 12

*United States v. Bond*, 22 F.3d 662 (6th Cir. 1994) ..... 7

*United States v. Edgecomb*, 910 F.2d 1309 (6th Cir. 1990) ..... 8

*United States v. Escobar*, 992 F.2d 87 (6th Cir. 1993) ..... 7

*United States v. Hallman*, 23 F.3d 821 (3d Cir. 1994) .... 12

*United States v. Kenyon*, 7 F.3d 783 (8th Cir. 1993) ..9, 12

*United States v. McManus*, 23 F.3d 878 (4th Cir. 1994) ..... 12

*United States v. Simpkins*, 953 F.2d 443 (8th Cir. 1992) ..... 11

*United States v. Thomas*, 54 F.3d 73 (2d Cir. 1995) .... 11

*United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992) ..... 11

## Rules and Regulations

Fed.R.Crim.P. 52(b) ..... 2, 6

Supreme Court Rule 10.1(c) ..... 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 924(c)(1) ..... 4, 12
21 U.S.C. §§ 801 *et seq.* ..... 9
21 U.S.C. § 841(a)(1) ..... 2
21 U.S.C. § 841(d)(1) ..... 3
21 U.S.C. § 846 ..... 2
28 U.S.C. § 1254(1) ..... 1
U.S.S.G. § 2D1.1(b)(1) ..... 4
U.S.S.G. § 4A1.2(a)(1) ..... 1, 6, 11
U.S.S.G. § 4A1.1(e) ..... 10
Mich. Comp. Laws §§ 257.625a and 436.34 ..... 9

## PETITION FOR A WRIT OF CERTIORARI

Peter Paul Hansen, ("Hansen") through his counsel, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The Western District Court of Michigan's judgment imposing sentence on August 12, 1994 is unreported (App. B). The Sixth Circuit Court of Appeals' opinion affirming this judgment is unreported (App. A).

## JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was rendered on November 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

U.S.S.G. § 4A1.2(a)(1):

> The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of **nolo contendere**, for conduct not part of the instant offense.

Federal Rule of Criminal Procedure 52(b):

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

## STATEMENT OF THE CASE

This is a case in which a minor participant in conspiracy to manufacture methcathinone (for which he acknowledged his culpability) has ended up with a ten-year penitentiary sentence unwarranted by either the nature of the offense or his participation in the alleged conspiracy. This disproportionate sentence results from the misapplication of the Federal Sentencing Guidelines. Hansen's "prior sentence" for acts which were inseparable from the events which gave rise to his conspiracy prosecution and plea, were recast as "independent" acts from which criminal history points were added to Mr. Hansen's sentence. The case squarely presents the issue of how prior related acts may or may not be used in sentencing procedures.

### A. The Basis for Hansen's Sentence

Hansen was charged on January 25, 1994 in a multi-party indictment including one count of conspiracy to manufacture methcathinone in violation of 21 U.S.C. §§ 846 & 841(a)(1) and two counts of possession of a listed chemical with intent to manufacture methcathinone

in violation of 21 U.S.C. § 841(d)(1) (the "Indictment").[1] The conspiracy was alleged to have lasted from September 1991 until the issuance of the Indictment on January 25, 1994.[2]

There are two events which resulted in both the "prior sentence" and Hansen's charge with conspiracy and possession: a September 30, 1992 stop and search of Mr. Hansen's automobile while driving on Michigan highways and a second October 9, 1993 stop and search of Mr. Hansen's automobile. In both, Hansen was found to be in possession of methcathinone and various raw materials needed to produce the drug. In both stops Hansen was also found to be in possession of alcoholic beverages in open containers in the car. On the October 1993 stop, Hansen was also charged with driving under the influence of alcohol. Hansen pleaded guilty to the alcohol related charges in state court and served 90 days in the county jail. He was not detained on the drug charges until his indictment in 1994.

The federal indictment for the conspiracy and possession of methcathinone substances against Mr. Hansen also relies, in large part, on the September and October

---

[1] Methcathinone or "cat" is a member of the methamphetamine family. Colloquially, it is considered a powerful "upper."

[2] Of the 49 overt acts described in the conspiracy indictment, Hansen is mentioned in four. The plea agreement noted that the prosecution agreed that Hansen did not play an aggravating or mitigating role in the charged offense.

stops. As noted above, he was charged with crimes pertaining to the possession and manufacture of methcathinone on the basis of evidence seized from Hansen's car on September 30th and October 9th. On May 17, 1994 Hansen pleaded guilty to conspiracy and possession charges.[3] A sentencing hearing was held on August 9, 1994.

**B. The Sentencing Calculus**

At his sentencing hearing Hansen received a base calculation of five points for the unlawful conduct to which he pleaded guilty. The score was then increased by an additional six points. The events of September 1992 resulted in a four-point upward adjustment in Hansen's sentence. As calculated by the District Court, Hansen received two points because the open liquor container charge to which he pleaded guilty was deemed to be "separate and independent" from the events which were the subject of the Indictment. Hansen received another two points because the acts which gave the rise to methcathinone-related charges were committed less than two years following the liquor violations. Hansen also was given two additional criminal history points for the stop that occurred on October 9, 1993. Again, the District Court deemed these matters "independent" from the

---

[3] Hansen was also charged with use of a handgun in violation of 18 U.S.C. § 924(c)(1). These charges were dismissed by the United States Attorney, but reappeared at the sentencing in the guise of adding to Hansen's sentence under U.S.S.G. § 2D1.1(b)(1).

Indictment notwithstanding the fact they were integral to the prosecution of the methcathinone case.

The District Court conducted no factual inquiry into the relatedness of the alcohol charges to the methcathinone charges. The Court's inquiry was limited to the following:

> It's a different offense, driving around with an open container in your car is a different offense from methcathinone dealing, so I don't think there's any prohibition as far as counting it. And I think it is properly counted.[4]

Instead of having a criminal history score of five, which would have placed Hansen comfortably in Criminal History Category III, he was given 11 points, and placed in Criminal History Category V. Based on these calculations, the District Court then sentenced Hansen to 10 years imprisonment and three years supervised release.

### C. The Appeals

Hansen appealed to the Court of Appeals for the Sixth Circuit, arguing that the District Court erred in calculating his criminal history score by counting the two prior state convictions in his criminal history score. Hansen challenged the District Court's decision and argued that the alcohol-related offenses should not have been included in Hansen's criminal history score because,

---

[4] *Joint Appendix on Appeal* to the United States Court of Appeals for the Sixth Circuit, Volume I, p. 87.

under § 4A1.2(a)(1), the alcohol-related offenses constituted conduct that was part of the federal Indictment and were not severable from the federal charges against Hansen. Hansen submitted that the District Court failed to make factfindings consistent with Sixth Circuit case law when faced with this § 4A1.2(a)(1) issue. Hansen also argued in the alternative that even if the District Court made sufficient findings under § 4A1.2(a)(1), then the District Court's conclusion, e.g., that the conduct was severable, is wrong. Finally, Hansen submitted that, pursuant to the plain error doctrine under Fed.R.Crim.P. 52(b), the October 9, 1993 stop, which constituted part of the federal Indictment, should be remanded to the District Court for further factfinding, or reversal, under § 4A1.2(a)(1).

In an unreported opinion, the Court of Appeals for the Sixth Circuit affirmed that the District Court did not err in finding that Hansen's state and federal crimes were severable instances of unlawful conduct. (App. A, *infra*).

## REASONS FOR GRANTING THE PETITION

### A. The Circuit Court Erred in Sustaining The District Court's Decision

In this case, the United States District Court for the Western District of Michigan erred when it counted Hansen's alcohol-related offenses as prior sentences and not a part of the instant federal Indictment. The District Court also failed to make the required factual findings on this point.

**1. The Failure to Make Findings of Fact**

*United States v. Beddow*, 957 F.2d 1330, 1338 (6th Cir. 1992), the District Court's governing precedent, holds that in using a prior sentence to enhance a sentence, the court must inquire into whether prior acts which led to the "prior sentence" and the present offense "involve conduct that is severable into two distinct offenses," or are closely related. If they are related, enhancement is improper. *Id.* In order to make this determination, *Beddow* instructs district courts to undertake a detailed "fact-specific" inquiry that involves more than just a consideration of the elements of the two offenses. *Id.* Courts must examine: (a) the temporal and geographical proximity of the two offenses, (b) common victims, and (c) a common criminal plan or intent. *Id. See also United States v. Bond*, 22 F.3d 662, 673-74 (6th Cir. 1994) (citing *Beddow*); *United States v. Escobar*, 992 F.2d 87, 89 (6th Cir. 1993) (same).

The District Court in this instance performed no such fact finding. It simply compared the elements involved in the alcohol related offenses and the methcathinone-related offenses and concluded that there was sufficient independence to warrant inclusion of the alcohol-related sentences as part of a prior criminal history calculus under the Federal Guidelines. ("It's a different offense driving around with an open container in your car from methcathinone dealing. . . . ") There was no inquiry into any of the other indicia or relatedness which are necessary to the analysis. *Beddow*, 957 F.2d at 1338; *Bond*, 22 F.3d at 673-74; *Escobar*, 992 F.2d at 89. This refusal to conduct a "fact-specific" *Beddow* inquiry is cause for remand. *See, e.g., Bond*, 22 F.3d at 673-74; *United States v.*

*Edgecomb*, 910 F.2d 1309, 1313-14 (6th Cir. 1990) ("If a district court fails to make a factual finding [under Fed. R.Crim.P.32], this court must remand for resentencing"). On this issue alone this Court should grant the Petition. A mechanical and truncated "overview" of the elements of the sets of offenses is hardly what the Guidelines or fair sentencing procedures require.

### 2. The September 30, 1992 and October 9, 1993 Stops Are Not Severable from the Instant Offense

The two alcohol-related offenses which significantly increased Hansen's sentence, were not severable from the Counts charged against Hansen in the federal Indictment and Hansen should not have received additional criminal history points for them.

It is also uncontested that the events which gave rise to both sets of charges are the same events. The stops were the same; the seizures were identical; the time and location were the same; the participants the same. Indeed, but for the alcohol-related conduct, the methcathinone-related activity would not have been discovered, and would not have been a part of the federal Indictment. Both stops were part of the allegations against Hansen in the federal Indictment. They are listed as overt acts in the conspiracy count of the Indictment (Count 1), as well as the possession counts in the Indictment (Counts 7 and 8). If the federal case had gone to trial, the Government would have been required to prove up the facts of these stops in order to obtain a conviction against Hansen. *See*

*also, United States v. Kenyon*, 7 F.3d 783 (8th Cir. 1993) (had defendant gone to trial on federal conspiracy count, prosecution would have been required to offer the related state charge as substantive evidence of the federal conspiracy). The stop was possible only because of the alcohol-related activity. There is absolutely no question but that the two sets of drug-related charges (alcohol and methcathinone) arise simultaneously and are inseparable for purposes of sentencing.

The "common victims" factor also suggests the relatedness of the offenses. Both drug charges (alcohol and methcathinone) are so-called "victimless" crimes. The underlying statutes at issue, 21 U.S.C. §§ 801 *et seq.* and Mich. Comp. Laws §§ 257.625a & 436.34,[5] seek to protect the same victim – society, generally. The same is true for the federal methcathinone charges.

Finally, both sets of charges fall within the "common scheme or plan" factor. Hansen's methcathinone-related activity is closely intertwined with his alcohol use and abuse. This is, in effect, a case about two types of drugs found in a defendant's possession at a single stop. To enhance a sentence by artificially extracting one set of drug charges in order to enhance the sentence on the others is both improper and unfair.[6] If the two points for

---

[5] It is not entirely clear from the record what statutory provisions Hansen was charged with under Michigan law. Nonetheless, based on the available information in the record, these two statutes appear to be the provisions at issue.

[6] The Sixth Circuit relies in its affirmance on *Beddow*. In *Beddow*, however, the events at issue – a weapons charge and laundering scheme – were not only so substantially different but

the September 30, 1992 alcohol conviction, as well as the two points for the corresponding enhancement under § 4A1.1(e) had not been given (as discussed above), then Hansen would have had a total of seven points, placing him in category IV. Further, eliminating the two points Hansen received for the October 9, 1993 alcohol offense would have taken him from a 7 to a 5, placing him in Category III. His range would have been 70-87 months rather than 100-125 months. Considering that Hansen ultimately received a 120-month sentence, the criminal history issue, of which the October 9, 1993 stop is an integral part, was worth at least 33 additional months (or two years and nine months) in prison to Hansen. Therefore, the two points at issue here for the October 9, 1993 stop substantially affected Hansen's rights.

**B. This is a Case of First Impression For This Court Which Warrants Review**

The Supreme Court has never directly addressed the question of the proper standard to be applied in determining whether "prior convictions" are severable from the offenses charged in federal indictments. A number of Courts of Appeals have grappled with this question, formulating haphazard formulae listing different factors to be considered by the trial courts. In short, no coherent standard has emerged from the Courts of Appeals. Trial courts, and the criminal defendants who bear the burden of proving the severability of their prior convictions,

---

also the offending conduct took place at different times and places. Here, the offenses are substantively related (drug abuse) and occurred simultaneously (alcohol and possession of methcathinone).

have been presented with a laundry list of factors with no clear guidance on how to apply them to any particular case. Given the large numbers of individuals affected by criminal history enhancements under § 1A1.2(a)(1), clarification of the applicable standard is an important question of federal law appropriate for this Court's consideration under Supreme Court Rule 10.1(c).

The Sixth Circuit's own decision in *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992) provides the most coherent enunciation of a standard for applying § 4A1.2(a)(1). In *Beddow*, the Sixth Circuit stated that in determining whether a prior sentence was imposed for conduct which was "part of the instant offense," a trial court should consider factors such as "the temporal and geographical proximity of the two offenses, common victims, and a common criminal plan or intent[.]" 957 F.2d at 1338. Other circuits have failed to clearly adopt or apply the *Beddow* approach. For example, the Second Circuit in *United States v. Thomas*, 54 F.3d 73 (2d Cir. 1995), recently remanded a case for factual findings under § 4A1.2(a)(1) without announcing the standard that the trial court should apply. The *Thomas* court merely stated in passing that since the prior convictions at issue encompassed some of the conduct for which the defendants were convicted in the instant charge, they could not be counted as "prior sentences" for purposes of increasing the defendants' criminal history category under § 4A1.2(a)(1).

Other Courts of Appeals have reached the same result, asserting without analysis in either their holding or as dicta that if the prior offenses constituted part of the federal Indictment and conviction, they cannot be included in a § 4A1.2(a)(1) calculation. *See, e.g., United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992); *United States v. Simpkins*, 953 F.2d 443 (8th Cir.), *cert. denied*, 504

U.S. 928 (1992); *United States v. Kenyon*, 7 F.3d 783 (8th Cir. 1993); *United States v. Belton*, 890 F.2d 9 (7th Cir. 1989).

The absence of a clear standard has resulted in decisions giving decisive weight to a single factor without consideration of the other issues. *See, e.g., United States v. Hallman*, 23 F.3d 821, 825 (3d Cir.), *cert. denied*, 115 S. Ct. 216 (1994) (relying on *Beddow* factors, but focusing on the inquiry whether the conduct is related, *e.g.*, "is it part of a common scheme or plan," rather than the "severability" point); *United States v. Banashefski*, 928 F.2d 349 (10th Cir. 1991) (pre-*Beddow*, focusing almost entirely on temporal relationship between prior and present offenses). Other decisions merely quote *Beddow* without applying the analysis to the facts of the case at hand. *See, e.g., United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

These cases demonstrate the conflict created by the lack of a uniform mandate for the factors to be considered by a trial court and the relative weight to be given each one. This is an issue of first impression for this Court, and is one suitable for review by this Court in light of these varying and conflicting Circuit Court opinions.

### C. This Is a Case of Public Significance Which Warrants Review

Where a case presents an issue of significant public concern coupled with either a conflict among the circuits or the absence of clear standards, petitions for writs of certiorari should be granted. Thus, for example, review of the standards for using evidence of firearms as a basis for a conviction under 18 U.S.C. § 924(c)(1) was granted where, as here: (a) the issue was one which federal courts

were frequently asked to address, and (b) the standards used by courts below were at best uncertain and, at worst, in substantial conflict. *See Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995).

Here the same factors apply. There are thousands of prosecutions per week in this country for drug-related activities. Many of these involve the application, at sentencing, of criminal history enhancements. The application of the Federal Sentencing Guidelines is absolutely central to this process and is, at present, the only guidance which the courts, prosecutors and defendants have. A criminal justice system – particularly one which (unfortunately) engages as large a number of its citizens as ours does – must be fair and consistent throughout the country. The sentencing of Mr. Hansen is neither.

## CONCLUSION

The petition for a Writ of Certiorari should be granted and set down for briefing and argument on the merits. Alternatively, the petition should be granted summarily and the decision of the United States Court of Appeals for the Sixth Circuit should be vacated and the case remanded to the Western District for Michigan for further finding and resentencing.

Respectfully submitted,

F. THOMAS HECHT*
MICHAEL A. FICARO
REBECCA D.WARD
HOPKINS & SUTTER
Three First National Plaza
Suite 3800
Chicago, Illinois 60602
(312) 558-6600

*Counsel of Record

**APPENDIX A**

**NOT FOR PUBLICATION**
**No. 94-1905**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | ) | **ON APPEAL FROM** |
| | ) | **THE UNITED STATES** |
| **Plaintiff-Appellee** | ) | **DISTRICT FOR THE** |
| | ) | **WESTERN DISTRICT** |
| **v.** | ) | **OF MICHIGAN** |
| **PETER PAUL HANSEN** | ) | |
| | ) | |
| **Defendant-Appellant** | ) | |

**BEFORE: KEITH, KENNEDY and RYAN, Circuit Judges.**

**PER CURIAM:** Defendant-Appellant, Peter Paul Hansen ("Hansen"), appeals the sentence imposed pursuant to his guilty plea for conspiracy to manufacture methcathinone in violation of 21 U.S.C. §§ 846 & 841(a)(1), and possession of a listed chemical with the intent to manufacture methcathinone in violation of 21 U.S.C. § 841(d)(1). Hansen contends that in imposing sentence under the United States Sentencing Guidelines ("U.S.S.G."), the district court erred by including two prior state of Michigan alcohol related offenses in his criminal history score. Hansen also claims that the district court incorrectly enhanced his offense level for possessing a firearm during a drug conspiracy. For the following reasons we **AFFIRM** the district court's findings.

I.

On September 30, 1992, at approximately 2:20 in the morning, Michigan state police officers observed a vehicle with a broken tail light crossing the center line of a road. A traffic stop was conducted and the driver of the vehicle was identified as Hansen. A passenger was identified as Katherine Elizabeth Jeske ("Jeske"). During the stop, officers observed a rum bottle in the rear seat of the vehicle which prompted them to search the car. The officers' search uncovered, *inter alia*, a gram scale, a magnetic stirrer, two one-gallon size cans of acetone (a chemical used to manufacture methcathinone), four glass pyrex flasks and numerous hoses and rubber stoppers. Hansen was arrested and subsequently convicted for transporting an open intoxicant in violation of Michigan State law. He was sentenced for this misconduct on May 19, 1993, at which time he was ordered to serve 90 days in county jail. He was released from county jail, after serving his sentence, on August 27, 1993.

On October 11, 1992, at approximately 12:25 a.m., two law enforcement officers from the Michigan Department of Natural Resources observed a vehicle casting a spotlight on a field in violation of a state law that prohibits using an artificial light between the hours of 11 p.m. and 6 a.m. to locate wildlife. When the officers approached the vehicle, the driver accelerated the car for about a quarter of a mile before stopping. After the vehicle stopped, one of the officers approached the driver, who appeared to be drunk, while the other officer (Officer Webster) proceeded toward the passenger side of the car. As Officer Webster approached the passenger side of the car he observed Hansen in the front passenger

seat with his hands between his knees and Jeske in the backseat. The record contains conflicting testimony about what happened next. According to Officer Webster, Hansen began to raise a handgun from between his legs using a two-handed grip. Webster claims that in response he immediately reached into the car and grabbed a .22-caliber handgun from Hansen. Hansen disputes Webster's testimony and asserts that he voluntarily handed the gun to Webster in a case.

Upon searching the vehicle the officers found a shotgun, a hunting bow, 27,000 ephedrine tablets, laboratory paraphernalia and a gallon jug half filled with liquid methcathinone. The handgun that was taken from Hansen had one live round in the chamber and nine live rounds in the magazine. The officers also found live ammunition in Hansen's pocket.

On October 9, 1993, police officers observed a vehicle run a stop sign in the city of Caspian, Michigan. When the officers activated their overhead lights, the car accelerated and attempted to escape. Officers pursued the fleeing vehicle for a short time until it spun out of control and came to a stop. Hansen was identified as the driver of the vehicle and was found to have a blood alcohol content of .18. Police found a liter bottle of whiskey, one third full, and three quarts of toluene – a drug used to manufacture methcathinone – inside the car. Hansen was subsequently arrested and served 90 days in county jail for driving under the influence of alcohol and having an open intoxicant in his car.

On October 14, 1993, a confidential informant told case agents that he had purchased one-half to one ounce

quantities of methcathinone from Hansen on approximately six occasions. The informant also stated that he had assisted Hansen on obtaining the ingredients for producing methcathinone on two prior occasions.

Thereafter, on January 25, 1994, Hansen was federally indicted in a multi-count, multi-defendant indictment. The indictment, which detailed Hansen's above-mentioned encounters with police, contained one count of conspiracy to manufacture methcathinone, two counts of possession of a listed chemical with intent to manufacture methcathinone, and one count of possession of a firearm during and in relation to a drug trafficking offense. Hansen pled guilty to the conspiracy and manufacturing counts in exchange for the government dismissing the firearms possession charge.

At sentencing, Hansen received a total of 11 criminal history points. Hansen received two points for serving 90 days in county jail for transporting an open intoxicant on September 30, 1992. He received an additional two points, as a byproduct of this misconduct, for committing the instant federal offense within two years of his release from the above-mentioned 90 day state sentence. In addition, Hansen was given another two criminal history points for a 90 day state sentence he served for having an open intoxicant in his car and driving under the influence on October 9, 1993.[1] The district court also increased Hansen's base offense level by two (from 28 to 30) for his

---

[1] The other five criminal history points were not raised by Hansen on appeal and are thus not discussed in this opinion.

possession of a .22 caliber handgun during the commission of a drug offense on October 11, 1992. This offense level was subsequently reduced by three levels because Hansen accepted responsibility for his crime. The district court used Hansen's criminal history score and offense level computation to sentence him to 120 months in prison.

II.

The first issue Hansen raises in this appeal is whether the district court erred by including his Michigan sentences in his criminal history score. We apply a clearly erroneous standard in reviewing factual findings made by a district court in imposing Guideline sentences. *United States v. Escobar,* 992 F.2d 87, 89 (6th Cir. 1993). In addition, since the district court is best situated to review the credibility of witnesses, we give due deference to that court's application of the Sentencing Guidelines to the facts. *United States v. Peters,* 15 F.3d 540, 546 (6th Cir.), *cert. denied,* 115 S. Ct. 219 (1994).

The district court concluded that the state alcohol related charges for which Hansen was previously imprisoned were not for the same conduct as the federal charges to which he pled guilty. However, Hansen contends that because drugs and drug paraphernalia included in the federal indictment were found during stops that resulted in his Michigan convictions, the unlawful conduct that constituted those state charges is a part of the instant offense and cannot be considered for the purposes of calculating his criminal history score. To

the contrary, the government asserts that Hansen's previous state convictions were severable from the instant federal offense and were thus properly included as prior sentences in Hansen's criminal history score.

In calculating a defendant's criminal history score, a district court must consider any prior sentences served by the defendant. U.S.S.G. § 4A1.1. A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt . . . for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). As a result, we must determine whether Hansen's state alcohol convictions were for "conduct not part of the instant offense."

In *United States v. Beddow*, 957 F.2d 1330, 1338 (6th Cir. 1992), a panel of this Circuit examined the meaning of the phrase "conduct not part of the instant offense" and concluded that,

> [T]he appropriate inquiry is whether the "prior sentence" and the present offense involve conduct that is severable into two distinct offenses. This is necessarily a fact-specific inquiry that involves more than just a consideration of the elements of the two offenses. Factors such as the temporal and geographical proximity of the two offenses, common victims, and a common criminal plan or intent also must be considered.

(citation omitted). Following the inquiry in *Beddow*, it is clear that the conduct which formed Hansen's state alcohol related offenses was indeed severable from the conduct which formed his federal drug conspiracy and manufacturing charges. For instance, if the case had gone to trial, the Government would not have had to prove any of the elements of the alcohol-related offenses in order to

obtain a conviction on the drug dealing charges. In addition, Hansen's alcohol related misconduct, which threatened the safety of other motorists and pedestrians, did not harm the same victims as his production and distribution of and methcathinone offenses, which threatened the consumers of a highly addictive drug. Furthermore, the state offenses and the federal offenses did not involve a common plan or intent on the part of Hansen.

Indeed, the only factor that supports Hansen's position that the state charges are not severable from the federal offenses is that the unlawful conduct that constituted the state charges was discovered on the same occasion as some of the unlawful conduct that constituted the federal offenses. However, as we reasoned in *Beddow*, this factor alone is not enough to make two instances of unlawful conduct indivisible. *See Beddow*, 957 F.2d at 1339 (rejecting defendant's contention that a previous state conviction was for conduct that was part of the instant federal offense simply because the state violation – carrying a concealed weapon – was discovered at the time he was arrested for money laundering, because "[a]dopting such a broad interpretation of offense conduct would render almost every crime committed contemporaneously with some other offense part of that offense"). Accordingly, we conclude that the district court did not err in finding that Hansen's state and federal crimes were severable instances of unlawful conduct.

## III.

Hansen next claims that the district court erred when it increased his offense level by two points for possessing

a firearm during the commission of a drug offense pursuant to U.S.S.G. § 2D1.1(b)(1). In support of this claim, he attacks the credibility of the government's witness, Officer Webster, and asserts that the district court should have accepted his testimony that the .22-caliber handgun was only used for hunting and was handed to Officer Webster in a case when the car was stopped.

Once the government proves that a defendant possesses a weapon during the commission of a drug offense, the burden then shifts to the defendant to show that it was "clearly improbable" that the weapon was connected to that offense. *United States v. Calhoun*, 49 F.3d 231, 236 (6th Cir. 1995). Here, Hansen has failed to show that it was clearly improbable that the gun was connected to his drug dealing activities. Hansen offers his testimony and that of his co-defendants to support his claim that the gun was only used for hunting purposes. However, if Hansen had been using the gun for hunting, logic dictates that he would not have picked it up while he was being interrogated by police officers. Rather, it was far more probable that the gun was in the car to protect the drugs contained in the back of the vehicle and that it may have been used for that purpose had Officer Webster not noticed the gun and disarmed Hansen. *See United States v. Perkins*, 994 F.2d 1184, 1192 (6th Cir.) (enhancement appropriate where loaded gun was found in glove compartment of truck being driven to drug trafficking rendezvous), *cert. denied*, 114 S. Ct. 279 (1993). As a result, the district court properly enhanced Hansen's offense level for possessing a firearm during the commission of a drug offense.

## IV.

For the foregoing reasons we **AFFIRM** the sentence imposed by the Honorable R. Allen Edgar, United States District Judge for the Western District of Michigan.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**Western District of Michigan**

UNITED STATES OF AMERICA

v.

Peter Paul Hansen

**JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed On or After November 1, 1987)

Case Number:
2:94-cr-06-08

Michael Manning
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1, 7 and 8.

[ ] was found guilty on count(s) ___ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21:846 and 841(a)(1) | Conspiracy to Manufacture Methcathinone | 1/25/94 | 1 |
| 21:841(d)(1) | Possession of a Listed Chemical with Intent to Manufacture Methcathinone | 1/25/94 | 7, 8 |

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___, and is discharged as to such count(s).

[X] Count(s) 12 (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $150, for count(s) 1, 7 and 8, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
382-74-8016

Defendant's Date of Birth:
6/25/66

Defendant's Mailing Address:

P.O. Box 44
10 Baker Road
Gaastra, MI 49927

Defendant's Residence Address:

Same

Date of Imposition Sentence:
8/9/94

/s/ R. Allan Edgar
R. Allan Edgar
United States
District Judge

Date: 8/12/94

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months, on each count, to be served concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant receive substance abuse treatment while incarcerated.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district
- [ ] at ___ a.m./p.m. on ___.
- [ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- [ ] before 2 p.m. on ___.
- [ ] as notified by the United States marshal.
- [ ] as notified by the probation office.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on each count, to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[X] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

[X] The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

[X] The defendant shall participate in a program of testing and treatment for alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

[X] The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**STATEMENT OF REASONS**

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

**Guideline Range Determined by the Court:**

Total Offense Level: 25

Criminal History Category: V

Imprisonment Range: 100 to 125 months

Supervised Release Range: Count 1 – 3 to 5 years

Count 7 & 8 – 2 to 3 years

Fine Range: $10,000 to $1,000,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ Not applicable

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

---